SUPREME COURT, U.S.
FILED
APR 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1593

STUART ALLEN PERKAL, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSEPH FORER
FORER & REIN
733 Fifteenth Street, N.W.
Washington, D. C. 20005
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
1. The Mail Fraud Statute, 18 U.S.C. § 1341	3
2. The Aider and Abettor Statute, 18 U.S.C. § 2	3
Statement of the Case	4
1. Summary of the Proceedings Below	4
2. The Schemes to Defraud	5
3. The Mailings	9
4. The Instructions to the Jury	11
5. The Affirmance on Appeal	13
Reasons for Allowing the Writ	14
Conclusion	19
Appendices:	
Appendix A—Opinion Below	1a
Appendix B—Judgment Below	9a
Appendix C—Order Denying Petition for Rehearing	10a
Appendix D	11a

Cases Cited

Abbott v. United States, 239 F.2d 310 (5th Cir. 1956).. 16
Nye & Nissen v. United States, 336 U.S. 613 (1949) ... 15
Pereira v. United States, 347 U.S. 1 (1954) 14, 16
Pinkerton v. United States, 328 U.S. 640 (1946) 2, 15

Page

Pritchard v. United States, 386 F.2d 760 (8th Cir. 1967) 17
United States v. Greer, 467 F.2d 1064 (7th Cir. 1972).. 18
United States v. Joyce, 499 F.2d 9 (7th Cir. 1974) 17
United States v. Peoni, 100 F.2d 401 (2d Cir. 1938)..17, 18
United States v. Wilson, 506 F.2d 1252 (7th Cir. 1974) 17

STATUTES

18 U.S.C. § 2 ..... 3, 4
18 U.S.C. § 1341 ..... 3, 4
28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

STUART ALLEN PERKAL, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Stuart Allen Perkal petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit which affirmed a judgment of the United States District Court for the District of Maryland convicting petitioner of violations of the federal mail fraud statute.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A hereto.

JURISDICTION

The judgment sought to be reviewed (reproduced in Appendix B hereto) was entered on January 30, 1976. A timely petition for rehearing was denied on March 1, 1976 (Appendix C hereto). On March 12, 1976, the Chief Justice ordered that the time for filing a petition for certiorari be extended to and including April 30, 1976 (No. A-773). The jurisdiction of the Court is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly held criminally liable for substantive violations of the mail fraud statute on the basis of the derivative liability of a co-conspirator established by *Pinkerton* v. *United States*, 328 U.S. 640 (1946), even though the factual issues involved in the *Pinkerton* doctrine were not submitted to the jury.

2. Whether a participant in a multi-party scheme to defraud is ipso facto criminally liable under the mail fraud statute for a mailing done or caused by another participant in executing the scheme, even though the scheme did not require or contemplate the mailing and the accused did not direct, cause or abet the mailing.

3. Whether the trial court's instructions erroneously authorized the jury to convict petitioner of aiding and abetting mailings incident to the execution of a fraudulent scheme if it found that petitioner had aided and abetted the fraud, even though he had not aided and abetted the mailings.

4. Whether the record in this case supports the imposition of criminal liability on petitioner for the mailings alleged in the indictment.

STATUTES INVOLVED

1. The Mail Fraud Statute, 18 U.S.C. § 1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

2. The Aider and Abettor Statute, 18 U.S.C. § 2

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

1. Summary of the Proceedings Below

Petitioner was indicted in the District of Maryland in 48 counts, each alleging that in violation of the mail fraud statute, 48 U.S.C. § 1341, and the aiding and abetting statute, 18 U.S.C. § 2, he knowingly caused a letter to be delivered by mail for the purpose of executing a scheme to defraud insurance companies (A. 3-55).[1] The first count described the alleged scheme at length (A. 3-7), and each subsequent count incorporated the description by reference (A. 9-55). The essence of the alleged scheme or schemes was that attorneys representing personal injury claimants in automobile accidents would send their clients to petitioner, a physician, with the understanding that he would furnish inflated medical bills and reports for the attorneys to use to obtain larger settlements from the insurance companies than were warranted by the true facts.

Petitioner was tried by jury. A judgment of acquittal was entered on counts 12 and 38, and guilty verdicts were returned on the 46 remaining counts (A. 1, 2). Petitioner was sentenced on each of the 46 counts to the statutory maximum of five years' imprisonment and a fine of $1,000. The imprisonment sentences were concurrent, but the fines were cumulated, making an aggregate sentence of five years' imprisonment and $46,000 in fines. (A. 91.)

The Court of Appeals affirmed, but remanded for a correction of the judgment and sentence to eliminate

[1] "A." refers to the Appendix filed in the appeal below. "Tr." refers to the trial transcript, with the immediately preceding number referring to the transcript volume. The transcript as a whole is not consecutively paginated.

multiple convictions and sentences for single mailings (Appendix A, pp. 8a, 9a). If the decision of the Court of Appeals stands, petitioner will have been convicted on a total of 37 counts, involving an aggregate sentence of five years' imprisonment and $37,000 in fines.[2]

2. The Schemes To Defraud

During the relevant period, Dr. Perkal was a practicing physician in Baltimore. The bulk of his practice consisted of persons with personal injury claims who were referred to Dr. Perkal by their lawyers (7 Tr. 72-73, 98, 149).

The 37 counts in this case grew out of 18 accidents in which seven Baltimore lawyers, representing a total of 28 claimants, negotiated claims over a three year period[3] with eight insurance companies. None of the lawyers was associated or collaborated with any of the others. One lawyer (Bomstein) represented the claimants in nine of the accidents, resulting in 17 counts. Another lawyer (Bernard Reamer) represented the claimants in four of the accidents, resulting in six

[2] Under the remand, the District Court is required to reduce the convictions and sentences on thirteen of the counts to six, and to determine whether the convictions and sentences on four other counts should be reduced to two. The United States Attorney has already informed the District Court and petitioner that the government now concedes that the latter reduction should be made. Accordingly, the counts which are alive for the purpose of this petition are counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16 (into which 17 and 18 merge), 19, 20, 21, 22, 23, 24 (into which 26 merges), 25 (into which 27 merges), 28 (into which 29 merges), 30 (into which 31 merges), 32 (into which 34 merges), 33 (into which 35 merges), 36, 37, 39, 40, 41, 42 (into which 44 merges), 43, 45, 46, 47, 48.

[3] From June 9, 1971 (Count 2, A.9) through July 1, 1974 (Count 40, A.47).

counts. Each of the five other lawyers represented a claimant or claimants in a single accident, one resulting in four counts, the others in two counts each. (See Appendix D hereto for record references.)

The record discloses the following pattern.

In order to obtain a large volume of settlements, necessary to make his personal injury practice lucrative, the lawyer hired runners to bring to him as clients persons involved in automobile accidents (8 Tr. 63-66, 69-71; 9 Tr. 10-18, 42-43, 240).[4] The lawyer's fee was a contingency of one-third of the recovery (8 Tr. 67; 9 Tr. 57). By a rule of thumb, used by the insurance companies and the lawyers, personal injury cases were by and large settled for about three times the total special damages (8 Tr. 17-20, 24-26; 9 Tr. 56).[5]

In order to obtain a larger settlement than the facts warranted, the lawyer would send the claimant to a physician with whom he had an arrangement whereby the physician would supply a medical bill and report which suited the lawyer's purpose—that is, a bill which exaggerated the medical expenses but commensurate with the nature of the accident and within practical settlement limitations, and a report of the injury and treatment which adequately rationalized the bill (8 Tr. 29-31, 42-46, 69; 9 Tr. 16-17, 37-38, 61).

---

[4] In 11 of the 18 accidents, a runner materialized at the scene of the accident and recruited the claimants before they left (5 Tr. 39-40, 65, 84-86, 195-96, 220-21, 288-90; 6 Tr. 15, 57, 138, 139, 207; G. Ex. 7). In a twelfth accident, the claimant got as far as the hospital before he was approached (6 Tr. 157-59).

[5] In the few instances in which a claim was made under a claimant's own insurance policy covering him for medical expenses, the settlement would be equal to the amount of the medical bills (8 Tr. 17, 20; 9 Tr. 55).

In the instances involved in the indictment, the lawyer sent the claimant or claimants to Dr. Perkal,[6] but sometimes the lawyer sent his clients to other physicians with whom he had similar arrangements (8 Tr. 91, 162, 187; 9 Tr. 34, 181). As to each count the evidence supports a finding, implicit in the verdict, that Dr. Perkal furnished the lawyer with an inflated medical bill and report.[7]

In addition to the lawyer's generalized knowledge that Dr. Perkal's bill and report would be inflated, the lawyer sometimes knew of specific details of the falsification (8 Tr. 42, 95; 9 Tr. 25-26, 70-71, 75, 100), and sometimes the lawyer directed specific falsifications, including modifications of bills after they had been submitted and back-dating the claimant's first visit to the physician (8 Tr. 27, 61-63; 9 Tr. 78, 119-46). Sometimes the lawyer, directly or through his runner, coached an uninjured claimant to tell Dr. Perkal that he had been injured (8 Tr. 46-50, 53-58; 9 Tr. 152-53).

The lawyer sent Dr. Perkal's medical bill and report to the insurance company along with evidence of other special damages, including bills for orthopedic devices and drugs prescribed by Dr. Perkal and the bills of

---

[6] 3A Tr. 203-04; 5 Tr. 16, 105, 117-18, 221, 247, 269, 291; 6 Tr. 17, 74, 117, 139, 208, 242, 254. In a few instances the runner directed the claimant to Dr. Perkal (5 Tr. 67-68; 6 Tr. 38, 159, 180), but this was done for the convenience and with the authorization of the lawyer (9 Tr. 43-44). In one instance a runner for lawyer Butler presented to two persons involved in the same accident a list of physicians from whom the claimants could choose on the basis of proximity. One claimant selected Dr. Perkal, thereby eventually producting counts 36 and 37; the other selected another physician. (6 Tr. 180.)

[7] This evidence came from testimony of the claimants. For record references see Appendix D hereto.

consulting physicians (see Appendix D). The lawyer then settled the claim with the insurance company, generally in line with the three-times special formula mentioned above. From the proceeds of the settlement the lawyer would pay Dr. Perkal's bill at a substantial discount, the amount of the payment being in the lawyer's discretion or at a flat rate (8 Tr. 77-80, 87-88; 9 Tr. 104-05). In addition to his one-third contingent fee, the lawyer would often keep for himself the difference between the face amount of Dr. Perkal's bill and the amount actually paid in satisfaction of the bill. Thereby the lawyer considered that he was reimbursing himself for his expenses for runners and other illegitimate disbursements. (8 Tr. 67, 87; 9 Tr. 212.)

The lawyer also promoted fraudulent settlements by bribing insurance company adjusters and lawyers (8 Tr. 174; 9 Tr. 213-39), and one lawyer threw an annual swimming party for 500 to 600 adjusters at which he would have 25 to 30 nude women (8 Tr. 177-78).

The indictment (A. 3-48) can readily be read as alleging that all the counts involved a single, over-all scheme to defraud insurance companies, participated in by Dr. Perkal and the various lawyers. The jury verdict does not, however, imply a finding of such a single scheme,[8] and the evidence shows that there were several schemes. The lawyers were competitors, not collaborators, and their business rivalry extended to obtaining satisfactory physicians (8 Tr. 86; 9 Tr. 180-81). The only rational view of the evidence which we have just recapitulated is that each lawyer independently devised

[8] The jury was instructed to consider each count separately (A. 19, 28), that each separate use of the mails in furtherance of a scheme to defraud is a separate offense (A. 25), and that Dr. Perkal could be found guilty as an aider and abettor (A. 26-27).

and operated a scheme or schemes to defraud, and that Dr. Perkal aided or abetted each lawyer in the fraud by supplying him with inflated medical bills and reports. The lawyer got the claimants by runners whom he paid. The lawyer decided what physician to use; the physician did not select the lawyer. The physician produced the kind of bill and report that the lawyer wanted, and the lawyer sometimes gave specific directions respecting the bill and report. The lawyer negotiated the settlement without consulting the physician. The lawyer decided how much the physician should be paid, not the other way around. The lawyer accomplished the frauds not only by using inflated medical bills and reports but by bribing insurance adjusters and lawyers and by throwing wild parties. The scheme was structured so that the lawyer was the primary beneficiary of the scheme, and he always received more than the physician. Under the conventional settlement formula of three times the special damages (of which Dr. Perkal's bill was only part), the lawyer's one-third contingent fee increased in direct proportion to the extent of the fraud; in addition the lawyer would generally keep for himself the amount he deducted from the physician's bill.

Accordingly, this case involves either seven or 18 separate, though similar, schemes to defraud, there being either one scheme per lawyer or one scheme per accident.

3. The Mailings

The letters which were mailed in execution of the schemes to defraud fall into two classes. In class 1, reflected in 21 counts,[9] were letters from the lawyers to

[9] Counts 1, 2, 3, 5, 6, 7, 9, 14, 16, 20, 22, 24, 28, 32, 36, 37, 39, 41, 43, 45, 47.

the insurance companies which enclosed, along with other documentation of special damages, Dr. Perkal's itemized medical bills and reports relating to the claimants.[10] In class 2, accounting for 16 counts,[11] the letters consisted of drafts in settlement of the claims sent by the insurance companies to the lawyers.[12]

The government conceded throughout the trial and appeal that Dr. Perkal did not mail any of the letters referred to in the indictment. Nor does the indictment allege any mailing from Dr. Perkal to a lawyer or from a lawyer to Dr. Perkal.

The lawyers usually transmitted medical bills and reports to the insurance companies by mail and the companies usually transmitted settlement drafts to the attorneys by mail. However, the uncontradicted evidence, supplied by government witnesses, was that it was not uncommon for the bills, reports and settlement drafts to be delivered by hand.[13] There is no evidence

[10] Sometimes the same bills and medical reports were sent to two insurance companies, as when one company was a liability insurer and the other a medical loss insurer, or when two potential defendants were insured by different companies.

[11] Counts 4, 8, 10, 11, 13, 15, 19, 21, 23, 25, 30, 33, 40, 42, 46, 48.

[12] Both types of letters were contained in the insurance companies' case files, introduced in evidence as government exhibits. See Exhibit D for the exhibit references.

[13] One insurance company employee testified that lawyers frequently came to the company's office to pick up settlement drafts (3A Tr. 127). Another adjuster testified that sometimes he had hand delivered settlement checks and sometimes the lawyers personally picked up the checks. He also testified that the materials transmitted by the lawyers "normally" came in by mail. (3 Tr. 44). One lawyer testified that mail was the "customary" means for transmittal of the medical bills and reports and the settlement drafts (8 Tr. 76-77). Bomstein, the lawyer involved in half of the accidents and a large plurality of the counts, testified that he sometimes delivered medical reports to insurance company adjusters by hand and that settlement drafts were sometimes delivered to him by hand (9 Tr. 83, 84, 90).

that Dr. Perkal ever directed or requested the use of the mails, that it made any difference to him whether the documents were delivered by mail or otherwise, or that he knew about the method of delivery in any particular case.[14]

4. The Instructions to the Jury

Under the trial court's instructions, the jury could have found Dr. Perkal guilty as being either the principal or an aider and abettor. The trial court did not instruct the jury regarding the derivative liability of a conspirator for substantative offenses committed by a co-conspirator in furtherance and as part of the conspiracy (A. 56-89).

The trial court charged the jury that there were two essential elements of the offenses, as follows (A. 73-74):

> Two essential elements are required to be proved in order to establish each of the offenses charged in the indictment:

[14] The Court of Appeals cited testimony of a lawyer (Bomstein) "to the effect that the defendant's purpose in submitting to him [the lawyer] the bills and report was 'so that I could mail them to the insurance companies to discuss settlement.'" (Appendix A, p. 5a). This is a misleading excerpt from Bomstein's testimony on the subject which reads as follows: "Q. Did Mr. Perkal know that you were mailing these bills and reports to insurance companies? A. Yes. Q. How do you know he knew? A. We discussed it. We discussed that *sometimes the adjuster came in and I would give them the reports and most times they were mailed out.* That was the purpose of his sending me the reports and bills, so that I could mail them to the insurance companies to discuss settlement." (9 Tr. 93.)

First: The act or acts of having devised, or having intended to devise, a scheme or artifice with the specific intent to defraud, or to attempt to defraud certain insurance companies, associations and corporations out of money or property by means of false or fraudulent representations as to bills or medical reports, as charged in the indictment.

And the second essential element: The act or acts of knowingly and willfully causing to be delivered by mail, according to the direction thereon, certain letters, documents or other material to carry out some essential step in the execution of said scheme or artifice to defraud, or to attempt to do so, as charged in the indictment."

On aiding and abetting the trial court instructed the jury as follows (A. 80-81):

The guilt of a Defendant may be established without proof that the accused personally did every act constituting the offense charged. Title 18 of the United States Code, Section 2 provides, and I quote: 'Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.'

'Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.'

In other words, every person who willfully participates in the commission of a crime against the laws, or under the laws of the United States may be found guilty of that offense.

In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to

say, that he willfully seeks by some act or omission on his part to make the criminal venture succeed.

* * * *

You of course may not find any Defendant guilty unless you find beyond reasonable doubt that every element of the offense, as I have defined those elements in these instructions, was committed by some person or persons, and that the Defendant participated in the commission of that crime.

5. The Affirmance on Appeal

The Court of Appeals held that the evidence supported the conviction on the ground that, "It has long been settled, contrary to the defendant's construction of the statute, that anyone who 'knowingly and intentionally' participates in the execution of the fraudulent scheme comes within the prohibition of the statute and this is true whether the indictment charges a conspiracy or not" (Appendix A, pp. 3a-4a, footnotes omitted). It noted authority in other Circuits for "applying conspiracy principles to a multi-member mail fraud scheme' " (Appendix A, p. 4a, n. 5). Thus the court below affirmed the conviction on the one possible theory which had not been submitted to the jury, the derivative liability of a conspirator for a substantive offense committed by a co-conspirator in furtherance and as part of the conspiracy. The court ignored petitioner's arguments that this theory was not available because the fact issues it involved had not been submitted to the jury and because the evidence could not support a finding that petitioner was a member of a conspiracy to violate the mail fraud statute as distinguished from a conspiracy merely to commit a local fraud.[15]

---

[15] Contrary to the impression conveyed by the opinion below, petitioner never claimed that conspiracy principles could not be utilized unless the indictment contained a conspiracy count.

Petitioner had also argued below that the trial court's instruction on aiding and abetting erroneously authorized the jury to convict merely by finding that petitioner had abetted the fraud rather than a principal's use of the mails to defraud. The Court of Appeals merely replied, "We have examined the charge and find no error therein" (Appendix A, p. 7a). Of course, this conclusion inevitably follows from the preceding holding that any one who knowingly and intentionally participated in any way in the execution of the fraudulent scheme was ipso facto a violator of the mail fraud statute.[16]

REASONS FOR ALLOWING THE WRIT

1. The mail fraud statute prohibits using the mails "for the purpose of executing" a scheme to defraud. The mailing need only be "incident to an essential part of the scheme" and need not be contemplated by the scheme nor essential to its execution. *Pereira* v. *United States,* 347 U.S. 1, 8 (1954). It is inherent in the statute, therefore, that a prosecution thereunder may, and usually does, center on a purely local offense, the perpetration of a private fraud. The federal nexus, an incidental use of the mails, is often a casual happenstance.

---

[16] The Court of Appeals made certain other holdings in purported refutation of contentions never advanced by petitioner. Petitioner did not, of course, argue below that "only the actual originators of the scheme" can be "culpable under the statute" (Appendix A, p. 3a) or that he "did not violate the statute" because he did not himself make the mail deposits (Appendix A, p. 4a). Petitioner did argue below that his conviction could not be affirmed *on the ground that he was the principal* because he did not originate the scheme and did not do or cause the mailings. Petitioner then went on to argue that for different reasons his conviction should not be affirmed on the other two possible bases of liability—aiding and abetting or the derivative liability of a conspirator.

The court below, following the lead of a number of other circuits, has extended this federal excursion into the area of local crimes far beyond the bounds of the statute and so as virtually to eliminate any demarcation between federal and state jurisdiction in fraud cases. This result follows from the court's holding that "anyone who 'knowingly and intentionally' participates in the execution of the fraudulent scheme comes within the prohibition of the [mail fraud] statute" (Appendix A, p. 3a). By this theory the statute applies, and it was so applied in this case, to an accessory to a local fraud even though he is not an aider and abettor of, or a co-conspirator in, the federal offense of using the mails to execute the fraud. Under the court's theory, the mail fraud statute would also apply to such other abettors of the local frauds in this case as the lawyers' runners and, in many instances, the claimants whom the lawyers represented.

2. The court below based its holding on principles of conspiracy law. Of course, a multi-party scheme to defraud is obviously a conspiracy to defraud. And it is settled that a conspirator is derivatively liable for substantive offenses committed by a co-conspirator in furtherance of and as part of the conspiracy. *Pinkerton* v. *United States,* 382 U.S. 640 (1946).

There are, however, limitations on the application of the *Pinkerton* doctrine, and these the court below jettisoned. The doctrine can be used to affirm a conviction only if the factual issues involved were submitted to the jury. The Court said in *Nye & Nissen* v. *United States,* 336 U.S. 613, 618 (1949) (emphasis supplied):

> "We held [in *Pinkerton* v. *United States*] that a conspirator could be held guilty of the substantive offense even though he did no more than join the conspiracy, provided that the substantive of-

fense was committed in furtherance of the conspiracy and as part of it. *A verdict on that theory requires submission of those fact issues to the jury.*"

This prerequisite to *Pinkerton* was specifically held applicable to mail fraud cases in *Pereira* v. *United States, supra.* There the Court stated (347 U.S. at 10, n. 1, emphasis supplied):

> The Government argues that Brading's conviction on the substantive offenses can be affirmed on the basis of Pinkerton v. United States, 328 U.S. 640, 90 L. ed. 1489, 66 S. Ct. 1180, since the record demonstrates that he conspired to defraud Mrs. Joyce and the acts charged in the substantive offenses were acts in furtherance of that design. *The Pinkerton case, however, is inapplicable here since the jury was not instructed in terms of that theory.* Nye & Nissen v. United States, 336 U.S. 613, 93 L. ed. 919, 69 S. Ct. 766.

In the instant case, as we have seen, the jury was not instructed in terms of the *Pinkerton* theory. Moreover, the evidence could not support a finding, essential to invoking *Pinkerton,* that petitioner was a member of a conspiracy to violate the mail fraud statute. As *Pereira* pointed out (347 U.S. at 11): "The essence of the conspiracy charge [in a mail fraud case] is an agreement to use the mails to defraud . . . . In contrast, the scheme to defraud required for the substantive offense need not contemplate use of the mails." See also *Abbott* v. *United States,* 239 F.2d 310, 314 (5th Cir. 1956). Petitioner was not a party to such an agreement because it was of no consequence to him whether the lawyer used the mails or other methods to correspond with the insurance companies; the use of the mails for the type of correspondence involved was neither inevitable nor universal; and he did not

authorize, write or participate in the mail uses. See *ante,* pp. 10-11. Cf. *United States* v. *Peoni,* 100 F.2d 401 (2d Cir. 1938).

It has become a commonplace in mail fraud cases for courts of appeal to disregard the instructional prerequisite to the invocation of the *Pinkerton* doctrine. See cases cited in the opinion below, Appendix A, pp. 3a-4a, n. 4 and n. 5, conspicuously including *United States* v. *Joyce,* 499 F.2d 9, 16-17 (7th Cir. 1974); *United States* v. *Wilson,* 506 F.2d 1252, 1257 (7th Cir. 1974); and *Pritchard* v. *United States,* 386 F.2d 760, 764 (8th Cir. 1967). It is important that this Court rectify this spreading error at the earliest feasible occasion, and that occasion is presented by this case.

3. The court below also distorted the principles governing the liability of aiders and abettors, and this distortion creates another avenue for an extraordinary extension of the mail fraud statute.

The evidence sustained a finding that petitioner aided and abetted the frauds perpetrated by the lawyers.[17]

---

[17] Petitioner could not be a principal in the violations charged for two reasons, nor did the court below hold that he was a principal. Under the statute, the principal is the one who, having devised a scheme to defraud, does or causes a mailing in execution of the scheme. As shown in our Statement of the Case, the record would not support a finding (1) that petitioner devised the schemes or (2) that he did or caused the mailings alleged in the indictment. The mailings were done or caused by the guilty lawyers. *Pereira* held that where a guilty person induces a mailing by an innocent person, he causes the use of the mails. But that principle does not apply where the mailing was done or caused by a guilty person without the direction of the accused. *Pereira* obviously did not intend to provide a novel basis of liability for an aider and abettor, and *Pereira* itself used orthodox aider and abettor principles when dealing with Pereira's accessory, Braden.

But it does not necessarily follow that thereby he aided and abetted the mailings perpetrated by the lawyers in execution of the fraud. This is shown by the discussion in the majority and minority opinions in *Pereira* v. *United States, supra,* respecting Pereira's co-defendant, Brading. See also *United States* v. *Greer,* 467 F.2d 1064 (7th Cir. 1972), holding that the aider and abettor of a theft was not ipso facto an accessory to the interstate transportation of the stolen property. For petitioner to be an aider and abettor of the mail frauds, he would have to have a "purposive attitude" toward the illegal mailings; that is, he must have "wished to bring about" the mailings. And the fact that the mailing was a natural and probable consequence of his antecedent participation in a local fraud would not be enough to establish these prerequisites so long as he did not know that the mails would actually be used in the particular instance instead of some other method of transmission and so long as the use of the mails was not inevitable. Cf. *United States* v. *Peoni, supra; United States* v. *Greer, supra.* For the same reasons that petitioner was not a member of a conspiracy to violate the mail fraud statute (*ante,* pp. 16-17), he was not an aider and abettor of the violations.

The trial court's instructions to the jury (*ante,* pp. 11-13) unmistakably authorized the return of a guilty verdict on a finding that petitioner participated in, had a purposive attitude toward, and sought to make succeed the fraud, so long as somebody else wilfully did or caused a mailing in execution of the fraud. The instructions did not require, and the evidence would not have permitted, a finding that petitioner had a purposive attitude toward the use of the mails. By affirming this instruction the Court of Appeals approved an-

other way of convicting an accused for violating the mail fraud statute solely on the basis of an antecedent participation in a local fraud.

CONCLUSION

Certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

JOSEPH FORER
FORER & REIN
733 Fifteenth Street, N.W.
Washington, D. C. 20005
Attorneys for Petitioner

April, 1976

APPENDIX

APPENDIX A

Opinion Below

(Filed Jan. 30, 1976)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1435

UNITED STATES OF AMERICA, *Appellee,*

-versus-

STUART ALLEN PERKAL, *Appellant.*

Appeal from the United States District Court for the District of Maryland, at Baltimore. C. Stanley Blair, District Judge.

Argued: December 1, 1975. Decided: Jan. 30, 1976

Before RUSSELL, FIELD and WIDENER, *Circuit Judges.*

Joseph Forer for Appellant; James M. Kramon, Special Assistant United States Attorney (Jervis S. Finney, United States Attorney, and Parker B. Smith, Assistant United States Attorney, on brief) for Appellee.

RUSSELL, *Circuit Judge:*

Convicted of violation of the federal mail fraud statute,[1] and of aiding and abetting the violation thereof,[2] the defendant has appealed. In essence, he contests the sufficiency of the evidence. We find the evidence sufficient to support the conviction and affirm, except for correction of sentence, as hereinafter provided for.

---

[1] 18 U.S.C. § 1341 (1970).

[2] 18 U.S.C. § 2 (1970).

The defendant does not deny the existence of a fraudulent scheme and practice or his participation in it. It is his contention on appeal that his connection with the scheme was not such as to bring his conduct within the mail fraud statute. The object of the scheme was the bilking of liability insurance carriers through the submission of inflated and false claims of disability and medical expense on behalf of personal injury claims arising out of automobile accidents. These claims were used as a basis for making settlements with the insurance carriers. Normally, it seems to have been the practice in the Baltimore area to base such settlements on a multiple of the medical bills as submitted. Accordingly, by inflating the medical bills with statements of fictitious or exaggerated services the parties to the scheme inflated the settlement.

The execution of the scheme involved three parties: The "runner" who contacted the injured party and steered him to either the doctor or the lawyer; the doctor who examined the claimant, prepared a report of the claimant's alleged injuries and submitted a bill for medical services; and the lawyer, who represented as attorney the claimant, submitted to the insurance carriers the exaggerated medical bills and reports, made settlement on the basis of such inflated bills and reports, and then divided the proceeds among the claimants and the three parties to the scheme. All the participants, including the defendant, depended on the receipt of the settlement drafts for their profit from the scheme and all, in their separate roles, were vital and essential cogs in the conduct of the fraudulent scheme.

As we have already indicated, the defendant admits that the scheme was a fraudulent one which fleeced the insurance companies of substantial sums and furnished him in turn with a handsome income. It is his contention, however, that despite his participation and profit from the fraudulent scheme, he was immune from prosecution under the mail fraud statute either as principal or as an aider and abettor. We disagree.

§ 1341, 18 U.S.C., declares that "[W]hoever, having devised or intending to devise any scheme or artifice to defraud," uses the mails "for the purpose of executing such scheme or artifice" violates such statute. While conceding that the elements of a mail fraud violation of the statute are (1) a fraudulent scheme and (2) the use of the mails in furtherance of that scheme,[3] the defendant asserts that the statute limits its application to "[W]hoever, having devised or intending to devise" the fraudulent scheme and by so doing makes only the actual originator of the scheme culpable under the statute. Assuming this construction, he contends that the lawyer in the scheme involved here, and not the defendant, was the obvious originator of the scheme. Under this theory, the defendant, even though an essential and active participant in the fraudulent scheme, it is argued, would not be punishable under the statute. Without deciding whether the record will justify the defendant's assumption that the lawyer was the originator of the scheme, it is clear that the defendant's contention as to the scope of the statute is erroneous. It has long been settled, contrary to the defendant's construction of the statute, that anyone who "knowingly and intentionally" participates in the execution of the fraudulent scheme comes within the prohibition of the statute[4] and this is true whether the indictment charges a conspiracy or

---

[3] *United States* v. *Grow* (4th Cir. 1968) 394 F.2d 182, 205, *cert. denied* 393 U.S. 840 (1968).

[4] *United States* v. *Wilson* (7th Cir. 1974) 506 F.2d 1252, 1257; *United States* v. *Joyce* (7th Cir. 1974) 499 F.2d 9, 16-17, *cert. denied* 419 U.S. 1031 (1974); *Pritchard* v. *United States* (8th Cir. 1967) 386 F.2d 760, 764, *cert. denied* 390 U.S. 1004 (1968); *Babson* v. *United States* (9th Cir. 1964) 330 F.2d 662, 665, *cert. denied* 377 U.S. 993 (1964); *Issacs* v. *United States* (8th Cir. 1962) 301 F.2d 706, 726, *cert. denied* 371 U.S. 818 (1962); *United States* v. *Dukow* (W.D. Pa. 1971) 330 F. Supp. 360, 364, *aff.* 465 F.2d 688; *United States* v. *Schall* (W.D. Pa. 1974) 371 F. Supp. 912, 928, *aff.* 503 F.2d 1400, *cert. denied* 420 U.S. 993 (1974), *reh. den.* 421 U.S. 972 (1975).

not.[5] This is made plain in *Reistroffer* v. *United States* (8th Cir. 1958) 258 F.2d 379, 395, *cert. denied* 358 U.S. 927 (1959), *reh. denied* 361 U.S. 856 (1959), and has often been reiterated in subsequent cases. In answering an argument similar to that advanced by the defendant, the Court in *Reistroffer* said:

> "The members of this Court are unanimously of the opinion that the evidence adduced against defendant Norris was sufficient to constitute a prima facie case and to support the verdict and judgment against him. If believed, it established that the gist of the scheme to defraud was brought to his knowledge and that he joined in with the principal schemers to accomplish their purposes. It is not necessary for the government to prove that he was one of those who originally devised the scheme. When he joined in the selling and the misrepresentations and deceptions, although in comparatively few instances, he brought himself within the provisions of the statute."

The defendant urges that, though he may have been a participant in the scheme, he did not place in any post office or authorized depository for mail matter the fraudulent doctors' bills and reports in execution of the scheme and thus did not violate the statute. However, it was declared years ago by Judge Learned Hand the terms "place"

---

[5] *United States* v. *Grow*, *supra*, 394 F.2d at 203; *United States* v. *Wilson*, *supra*, 506 F.2d at 1257; *United States* v. *Joyce*, *supra*, 499 F.2d at 17.

In *United States* v. *Wilson*, *supra*, the Court said:

> "It is not essential that the indictment contain a separate count charging conspiracy in order to take advantage of the doctrines peculiar to conspiracy."

Again, in *United States* v. *Joyce*, *supra*, it is stated:

> "* * * We therefore have no hesitation in joining at least six other circuits in applying conspiracy principles to a multi-member mail fraud scheme. The nature of the group activity is the same whether or not a conspiracy is charged."

and "cause to be placed" in the statute did not mean that a defendant, to violate the statute, must personally deposit the critical matter in the mails or "must specifically authorize its deposit, it is enough if he knows that in the execution of the scheme letters are likely to be mailed, and if in fact they are mailed." *United States* v. *Cohen* (2d Cir. 1944) 145 F.2d 82, 90, *cert. denied* 323 U.S. 799 (1944). This construction has recently been restated in *United States* v. *Shepherd* (5th Cir. 1975) 511 F.2d 119, 121, where the Court said that "it is not necessary that the defendant himself place the matter into a mail depository, only that he have a reasonable basis to foresee that the mails will be used;" it is, also, in conformity with the rulings of the Supreme Court in both *Pereira* v. *United States* (1954) 347 U.S. 1, 8-9, and *United States* v. *Maze* (1974) 414 U.S. 395, 399.

There was testimony in this case from a lawyer associated in the scheme with the defendant to the effect that the defendant's purpose in submitting to him [the lawyer] the bills and reports was "so I could mail them to the insurance companies to discuss settlement." It cannot be gain said, in the light of this testimony, that the defendant knew that the fraudulent bills and reports were likely to be mailed and that the use of the mails in the submission of those bills and reports could "reasonably be foreseen."[6] It is of no moment that in some instances other than those included in the separate counts of the indictment the bills may have been handed directly to the insurance adjuster and not mailed or that, as the defendant argues, all the bills and reports could have been so handed without the use of the mails. The fact of the matter is that the mails were normally used in the execution of the scheme and were admittedly used in all the cases specified in the indictment. That is sufficient to bring "the activity in question within federal criminal jurisdiction." *See United States*

---

[6] *See United States* v. *Maze*, *supra*, 414 U.S. at 399.

v. *Flaxman* (7th Cir. 1974) 495 F.2d 344, 348, *cert. denied* 419 U.S. 1031 (1974).

Of course, it is true, that the mailings must be "sufficiently closely related"[7] to, or "incident to an essential part of the scheme"[8] in order to bring the case within the statute. But there can be no question in this case that the mailings were crucial to the execution of the fraud. The material included in the mailings represented the essential basis on which the parties rested their fraudulent claim and "played a significant part in enabling the defendant" and his fellow participants to execute their scheme.[9] The mailings preceded and were essential to the true object of the scheme, *i.e.*, the settlement of the inflated claim. As the Court said in *United States* v. *Kenofskey* (1917) 243 U.S. 440, 443, when these mailings were made, "[T]he most vital element in the transaction * * * remained yet to become an actuality, i.e., the payment and receipt of the money." This case is quite different from *Kann* v. *United States* (1944) 323 U.S. 88, *Parr* v. *United States* (1960) 363 U.S. 370 and *United States* v. *Maze, supra,* in which the mailings occurred after the object of the fraud had been accomplished and were "irrelevant to the scheme." *See United States* v. *Kelem* (9th Cir. 1969) 416 F.2d 346, 349-50, 9 A.L.R. Fed. 885, 890-1, *cert. denied* 397 U.S. 952 (1969); *United States* v. *Sampson* (1962) 371 U.S. 75, 80.

Factually, this case is similar to *United States* v. *Reicin* (7th Cir. 1974) 497 F.2d 563, at 565, *cert. denied* 419 U.S. 996 (1974) and *United States* v. *Sternback* (7th Cir. 1968) 402 F.2d 353, *cert. denied* 393 U.S. 1082 (1968). Like the situation here, both of those cases involved schemes, participated in by lawyers and doctors, "to defraud insurance and other companies in personal injury cases by preparing

---

[7] *United States* v. *Maze, supra,* 414 U.S. at 399.

[8] *Pereira* v. *United States, supra,* 347 U.S. at 8.

[9] *See United States* v. *Maze, supra,* 414 U.S. at 401.

and submitting false and exaggerated medical reports and bills * * *."[10] In *Sternback,* it was the doctor who had been indicted and convicted under the mail fraud statute and in *Reicin,* it was the lawyer. The defendant would distinguish *Sternback* because, as he contends, the lawyer who submitted the bills there was an innocent party to the scheme, whereas, in this case, the lawyer was an active and knowing participant. We do not read *Sternback* as suggesting that the lawyer who submitted the bills was an innocent participant in the scheme; indeed, we think the contrary to be the necessary inference from the opinion. In any event, we do not see why the fact that both the lawyer and the doctor in this case were knowing participants in the fraudulent scheme should provide the doctor-defendant with immunity. So far as *Reicin* is concerned, the defendant dismisses it as disclosing "no perceptible relevancy to the issues in this case," even though it involved a prosecution of one of the participants in a scheme similar in every respect to that presented by the facts in this case.

The defendant, also, claims error in the trial court's instruction. We have examined the charge and find no error therein. There is, however, merit in his contention that certain of the counts in the indictment, on which the defendant was convicted, "merged because of there being only one mailing." In fact, the Government concedes merger as to counts 16, 17, and 18, counts 24 and 26, counts 25 and 27, counts 28 and 29, counts 32 and 34 and counts 42 and 44. In addition, counsel for the defendant takes the position that counts 30 and 31 and counts 33 and 35 merged because they concerned one and the same mailing. This additional claim of the defendant presents no contest between the parties on the applicable legal principle; the par-

---

[10] 497 F.2d at 565.

See, also, United States v. *Bornstein* (7th Cir. 1971) 447 F.2d 742, *cert. denied* 404 U.S. 851 (1971), which involved a scheme between an automobile garageman and an insurance adjuster to defraud the insurance carrier by inflated repair bills.

ties agree as to this. Their difference principally is a factual one and the District Court is in better position to resolve that factual issue than we are. We accordingly remand the cause to the District Court for correction of the judgment and sentence, and appropriate remission of fines so as to give effect to the merger of such counts of the indictment as covered one and the same mailing as agreed on by the parties and for resolution of the issue whether there was a merger of counts 30 and 31, and counts 33 and 35. Except for remand for this purpose, the judgment of conviction is affirmed.

APPENDIX B

Judgment Below

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1435

(Filed January 30, 1976)

UNITED STATES OF AMERICA, *Appellee,*

vs.

STUART ALLEN PERKAL, *Appellant.*

Judgment

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby affirmed. The case is remanded to the United States District Court for the District of Maryland, at Baltimore, for correction of the judgment and sentence, consistent with the opinion of this Court filed herewith.

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX C

Order Denying Rehearing

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1435

(Filed March 1, 1976)

UNITED STATES OF AMERICA, *Appellee,*

–versus–

STUART ALLEN PERKAL, *Appellant.*

Order

No judge in regular active service having requested a poll of the court, rehearing *en banc* is denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

With the concurrence of Judge Field and Judge Widener.

For the Court:

/s/ DONALD RUSSELL
United States Circuit Judge

APPENDIX D

This Appendix groups the indictment transactions by the accidents. Each accident is given an arbitrary letter. There is shown the relevant counts, the lawyer involved, the insurance company and the exhibit number for its pertinent file, the personal injury claimant, and the transcript reference to the beginning of the claimant's testimony. The insurance company files contain the documents which were mailed as alleged in the indictment.

Accident A

Counts 1 and 2. Lawyer, Stanley J. Bomstein

Insurance Co. file, G. Ex. 18 (Nationwide).

Claimants, Madeline Giles, 5 Tr. 149; Eugene Evans, 6 Tr. 12.

Accident B

Counts 3 and 4. Lawyer, Bomstein

Insurance Co. file, G. Ex. 19 (Nationwide).

Claimant, Muriel Campbell, Jr., 6 Tr. 136.

Accident C

Count 5. Lawyer, Bomstein

Insurance Co. file, G. Ex. 2 (Allstate).

Claimants, Nellie Smith, 5 Tr. 172; Larry Smith, 6 Tr. 36.

Accident D

Count 6. Lawyer, Bomstein

Insurance Co. file, G. Ex. 3 (Allstate).

Claimants, Pauline Brown, 6 Tr. 54; James Browne, 6 Tr. 89.

Accident E

Counts 7 and 8. Lawyer, Bomstein

Insurance Co. file, G. Ex. 4 (Geico).

Claimant, Stanley Smith, 5 Tr. 63.

Accident F

Counts 20 and 21. Lawyer, Bomstein

Insurance Co. file, G. Ex. 20 (Nationwide).

Claimants, Luther Wagner, 5 Tr. 38; Colleen Hack, 5 Tr. 132.

Accident G

Counts 39 and 40. Lawyer, Bomstein

Insurance Co. file, G. Ex. 7 (Geico).

Claimant, Lee Davis, did not testify.

Accident H

Counts 41, 42 (merged with 44), 43. Lawyer, Bomstein

Insurance Co. files, G. Ex. 8 (Criterion), G. Ex. 21 (Nationwide).

Claimant, Floyd Mack, 3A Tr. 142.

Accident I

Counts 45 and 46. *Lawyer, Bomstein*

Insurance Co. file, G. Ex. 1 (Md. Blue Cross & Blue Shield).

Claimant, Michael F. Paul, 6 Tr. 72.

Accident J

Count 16 (merged with 17 and 18). Lawyer, Bernard Reamer

Insurance Co. file, G. Ex. 15 (State Farm).

Claimants, Gregory Oliver, 5 Tr. 216; Roddie Wood, 5 Tr. 286; Richard Gordon, 6 Tr. 2.

Accident K

Count 19. Lawyer, Bernard Reamer

Insurance Co. file, G. Ex. 16 (State Farm).

Claimant, Nora Brown, 6 Tr. 205.

Accident L

Counts 22 and 23. Lawyer, Bernard Reamer

Insurance Co. file, G. Ex. 10 (Aetna)

Claimants, Lucille Harp, 5 Tr. 193; James Harp, 5 Tr. 268.

Accident M

Counts 32 (merged with 34), 33 (merged with 35). Lawyer, Bernard Reamer

Insurance Co. file, G. Ex. 5 (Geico).

Claimants, Tyrone Jenkins, 3 Tr. 83; Ruby M. Jenkins, 5 Tr. 103; Bryant Waller, 6 Tr. 112.

Accident N

Counts 9, 10, 11, 13. Lawyer, Howard Reamer

Insurance Co. files, G. Ex. 9 (Aetna), G. Ex. 22 (Royal Globe).

Claimants, Irving Owens, 3A Tr. 201; Edith Owens, 5 Tr. 14.

Accident O

Counts 47 and 48. Lawyer, Morris S. Berman

Insurance Co. file, G. Ex. 13 (Aetna).

Claimant, Gilland McGuire, 5 Tr. 245.

Accident P

Counts 24 (merged with 26), 25 (merged with 27), 28 (merged with 29), 30 (merged with 31).

Lawyer, Maurice Siegel

Insurance Co. files, G. Ex. 11 (Aetna), G. Ex. 17 (State Farm).

Claimants, Vera Palmer, 6 Tr. 222; Muriel Young, 6 Tr. 186.

Accident Q

Counts 14 and 15. Lawyer, Joseph Askin

Insurance Co. file, G. Ex. 14 (State Farm).

Claimant, Ella Cunningham, 6 Tr. 239.

Accident R

Counts 36 and 37. Attorney, Richard Butler

Insurance Co. files, G. Ex. 6 (Geico), G. Ex. 12 (Aetna).

Claimant, James C. Hill, 6 Tr. 155.

Supreme Court, U. S.
FILED
JUL 10 1976
MICHAEL RODAK, JR., CLERK

No. 75-1593

In the Supreme Court of the United States

OCTOBER TERM, 1976

STUART ALLEN PERKAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MARC PHILIP RICHMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1593

STUART ALLEN PERKAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 530 F. 2d 604.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1976. A petition for rehearing was denied on March 1, 1976. The Chief Justice extended the time for filing a petition for a writ of certiorari to April 30, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence of petitioner's participation in a fraudulent scheme is sufficient to support his convictions under the mail fraud statute.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of 46 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent five-year terms of imprisonment, and fined $1,000 on each count. The court of appeals affirmed the convictions on 37 counts and remanded for a correction of judgment and sentencing on the remaining counts, some of which, the court held, had merged (thus reducing the total fine) because they did not charge separate mailings (Pet. App. A).

The facts are set forth in the court of appeals' opinion and in the petition for certiorari (Pet. 4-11; Pet. App. 2a). Petitioner, a medical doctor most of whose patients were personal injury claimants referred to him by lawyers, participated with seven lawyers[1] in a scheme (or several schemes)[2] over a three-year period to defraud eight insurance companies of large sums of money, paid in settlement of negligence claims arising out of automobile accidents. Petitioner rendered inflated bills for alleged medical treatment of patients sent to him by the lawyers. The lawyers sent the bills to the insurance companies, usually by mail. The insurance companies sent checks to the lawyers in payment of the accident claims, the proceeds of which the lawyers shared with petitioner. Petitioner knew that the mails were usually used in the submission of claims to and receipt of payment from the insurance companies (Pet. 10 n. 13, 11 n. 14). Each count on which

---

[1]Two of these lawyers, Morris S. Berman and Stanley J. Bomstein, pleaded guilty to mail fraud and testified as government witnesses.

[2]Since there was no conspiracy count, it is of no moment whether there was a single scheme or, as petitioner claims (Pet. 8 and n. 8), several similar schemes, each involving petitioner and different attorneys.

petitioner was convicted related to a separate mailing made or caused to be made by the lawyers in furtherance of the fraudulent scheme; petitioner made no mailings.

ARGUMENT

1. Petitioner in effect concedes that there was a scheme to defraud the insurance companies in which he participated by "furnish[ing] the lawyer with an inflated medical bill and report" (Pet. 7, 9), and that the mailings for which he was convicted were made "in execution of the schemes to defraud" (Pet. 9), in violation of the mail fraud statute. He contends, however, that there was an insufficient connection between his activities and the mailings to justify his conviction, because a person who has not himself made the mailings violates the mail fraud statute only if he "'wished to bring about' the mailings" (Pet. 18), an element which he contends is lacking here. Petitioner's argument rests upon a misinterpretation of the statute and an erroneous view of the evidence.

The mail fraud statute (18 U.S.C. 1341) provides that "[w]hoever, having devised * * * any scheme * * * to defraud * * *, for the purpose of executing such scheme * * *, places in [the mails] * * *, or knowingly causes to be [mailed] * * *" any matter, is guilty of mail fraud. *Pereira* v. *United States*, 347 U.S. 1, held that to establish a violation of the statute "it is not necessary to show that [an individual] actually mailed or transported anything [himself]; it is sufficient if [he] caused it to be done" (*id.* at 8). The Court explained (*id.* at 8-9):

> Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.

The court of appeals correctly held (Pet. App. 5a) that under this standard the evidence supports petitioner's convictions. The evidence showed that petitioner submitted fraudulent medical bills to the attorneys knowing that "most times they were mailed out" (see Pet. 11 n. 14) and that the mails were the "customary" means of receiving proceeds from the insurance companies (see Pet. 10 n. 13). Viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), this evidence established that petitioner caused the mails to be used in furtherance of the fraudulent scheme. As the court of appeals said (Pet. App. 5a), it shows "that [petitioner] knew that the fraudulent bills and reports were likely to be mailed and that the use of the mails in the submission of those bills and reports could 'reasonably be foreseen.'" Indeed, since petitioner's profit from the scheme depended upon the payment of the inflated bills by the insurance companies, he obviously " 'wished to bring about' the mailings" which were part of the submission and collection of the bills.

2. Petitioner also challenges (Pet. 17-18) the instructions to the jury. The court told the jury (C.A. App. 76):[3]

> The use of the United States mails in furtherance of a scheme to defraud is, as I've indicated, an essential element of the offense charged. It is not necessary that * * * [petitioner] do any actual mailing, himself, or that he specifically intends that the mails be used. It is sufficient if the mails were in fact used to carry out the scheme, and if [petitioner] knew or could reasonably foresee that the mails would be used in furtherance of or as a consequence of the scheme.

The court further instructed the jury (C.A. App. 78-79): "And if upon consideration of any count in the indictment

[3]"C.A. App." refers to the appendix filed in the court of appeals.

you have a reasonable doubt that [petitioner] could foresee that the mailing would be made, * * * you should * * * acquit [petitioner] on the charge contained in that count." These instructions were proper under *Pereira* v. *United States, supra.*

The additional instructions (quoted at Pet. 12-13) concerning "aiding and abetting" under 18 U.S.C. 2 did not, as petitioner suggests (Pet. 18), provide an alternative theory under which petitioner could be convicted even though he could not have foreseen that the mailings would take place.[4] The court correctly explained 18 U.S.C. 2 to the jury (see Pet. 12) as encompassing "every person who wilfully participates in the commission of a crime against the laws * * * of the United States * * *." As quoted above, the court had previously explained that the "crime" referred to in its instructions required a foreseeable mailing. Thus, the aiding and abetting instruction merely underscored that, to be guilty of violating 18 U.S.C. 1341, petitioner did not himself have to mail the fraudulent bills. Cf. *Pereira* v. *United States, supra,* 347 U.S. at 8, 10 (in which this Court cited 18 U.S.C. 2 to support its holding that it is sufficient if the evidence shows the individual caused the mailing even though he did not actually do it).[5]

[4]Petitioner did not object to the instructions regarding aiding and abetting, as he was required to do under Fed. R. Crim. P. 30.

[5]Petitioner contends (Pet. 15) that the court of appeals' opinion in effect eliminates the intent requirement for causing use of the mails. However, he relies upon an out-of-context quotation from the opinion (see Pet. App. 3a). The court's statement which he quotes—that "anyone who 'knowingly and intentionally' participates in the execution of the fraudulent scheme comes within the prohibition of the [mail fraud] statute"—was made in rejecting what the court perceived as petitioner's contention that the statute reached only "the actual originator of the scheme" (Pet. App. 3a). The court specifically held that intent regarding the use of the mails is required under the statute (Pet. App. 5a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MARC PHILIP RICHMAN,
Attorneys.

JULY 1976.